

## **REMARKS**

The claims have been amended so as to better define the invention. Applicants submit that no new matter has been added. In view of the claim amendments, Applicants submit that claims 2-5, 11, 15, 24-33 & 39-40 read upon the elected invention.

### **Rejection under 35 U.S.C. 102(b)**

The Office Action rejected claims 11, 14, 15, 24-27, 29, 30 & 34 as being anticipated by Martin as set forth on page 4 of the Office Action. Claims 14 & 34 have been cancelled without prejudice or disclaimer, therefore the rejection is moot with regard to these claims. Applicants submit that the cited reference does not anticipate the remaining claims because it does not disclose any of the 2-oxoacids recited in claim 11. In view of the amendments and above remarks, Applicants request withdrawal of the rejection.

### **Rejection under 35 U.S.C. 102(e)**

The Office Action rejected claims 11, 14, 15, 24-31 and 33-38 as being anticipated by Teichberg as set forth on pages 5-8 of the office action. Claims 14 & 34 have been cancelled without prejudice or disclaimer, therefore the rejection is moot with regard to these claims. Applicants submit that the cited reference does not anticipate the remaining claims because Teichberg discloses that 2-oxoacids deals specifically with the central nervous system (e.g. brain) and makes no mention of other tissue, let alone muscle tissue as set forth in the amended claims. The claims now recite that the 2-oxoacids be administered in an amount effective to increase vascularization in muscle tissue and are directed to a different patient population (i.e. acute hypoxia) than that disclosed in the cited reference. Teichberg does not disclose or suggest this feature of the amended claims and relates exclusively with neuronal tissue in brain.

In addition, the examiner cites several cases as support for the premise that discovering a benefit of an old process does not render the process and its intended use patentable (see Office Action at page 7). The Examiner is improperly applying the recited cases to the present situation. The recited cases do not relate to therapeutic methods. It has long been held that a new indication for a previously known therapeutic agent represents patentable subject matter and this premise has most recently been affirmed by the courts (Prometheus Laboratories, Inc. v. Mayo Collaborative Services, No. 08-1403, Fed. Cir. 2009). The examiner's rejection therefore has no basis as applied to the present claims. In view of the amendments and above remarks, Applicants request withdrawal of the rejection.

### **Rejections under 35 U.S.C. 103**

The Office Action rejected claims 11, 14, 15, 24-31 and 33-38 as allegedly being obvious in view of Teichberg and Semenza as set forth on pages 10-11 of the office action. Claims 14 & 34 have been cancelled without prejudice or disclaimer, therefore the rejection is moot with regard to these claims. As mentioned above,

Teichberg relates exclusively to neuronal tissue. The amended claims now recite the feature of increasing vascularization in muscle tissue. Teichberg does not disclose nor suggest the use of any 2-oxoacid for increasing tissue vascularization in muscle tissue as set forth in the amended claims. Semenza also makes no reference to muscle tissue and thus does not render the deficiencies of Teichberg with regard to the amended claims. The remaining rejected claims all depend from claim 11 and thus incorporate this feature as well. In view of the amendments and above remarks, Applicants request withdrawal of the rejection.

The Office Action rejected claims 11, 13-15, 24-31 and 33-38 as allegedly obvious in view of Teichberg, Semenza and Fuji as set forth on page 11 of the office action. Claims 14 & 34 have been cancelled without prejudice or disclaimer, therefore the rejection is moot with regard to these claims. The deficiencies of Teichberg and Semenza are discussed above. The Examiner cites Fuji with regard to thrombosis (see Office Action at page 10). Fuji does not disclose or suggest any reference to acute hypoxia in muscle tissue as set forth in the claim 11. The remaining rejected claims all depend from claim 11 and thus incorporate this feature as well. Accordingly, the rejection is moot and should be withdrawn.

The Office Action rejected claims 11, 14, 15 and 24-38 as allegedly obvious in view of Teichberg, Semenza and Dykstra as set forth on page 11 of the office action. Claims 14 & 34 have been cancelled without prejudice or disclaimer, therefore the rejection is moot with regard to these claims. The deficiencies of Teichberg and Semenza are discussed above. The Examiner cites Dykstra with regard transdermal administration (see Office Action at page 11). Dykstra does not disclose or suggest any reference to acute hypoxia in muscle tissue as set forth in claim 11 and thus does not remedy the deficiencies of Teichberg and Semenza. The remaining rejected claims all depend from claim 11 and thus incorporate this feature as well. Accordingly, the rejection is moot and should be withdrawn.

## **CONCLUSION**

Applicants have amended claims to better capture the envisioned commercial embodiments. Applicants assert that the specification and originally filed claims fully support the amended claims. The Examiner is invited to contact the undersigned at the telephone number listed below if further discussion of any remaining issue will advance the prosecution.

Respectfully submitted,

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